FOR ARGUMENT

No. 79-45

Supreme Court, U.S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

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December 19, 1979

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

This brief is filed under Rule 42(1) of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association, founded in 1853, is an association of twelve leading banks in the City of New York, each of which is owned by a bank holding

company.[1] The Association clears checks and other items in the New York area and, through its counsel, files briefs before courts of appellate jurisdiction in cases that raise questions of law materially affecting banks or their affiliates.

The bank holding company organizations of which the Association's members are a part have a strong and direct interest in being able to compete in the offering of investment advisory, trust and other services throughout the Union, free of discriminatory state regulation unauthorized by Congress.

Statement

Appellee Bankers Trust New York Corporation ("Bankers"), a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.*, seeks to offer investment advisory and trust services in Florida through local offices of a nonbank subsidiary (B2-7).[2] Bankers has been prevented from doing so by reason of the statutes held invalid below, Florida Statutes § 659.141(1) (first sentence)[3] and § 660.10 (B4-7). Those statutes, reprinted

[1] The members of the Association are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Bank of North America and European American Bank & Trust Company.

[2] Appellee BT Investment Managers, Inc. is a Delaware subsidiary of Bankers formed for the purpose of conducting an investment advisory business in Florida (B2). "B", "C" and "D" citations are to the appendices to the Jurisdictional Statement ("JS") so entitled. "App." citations are to the separately bound Appendix (tan cover).

[3] The judgment below did not extend to that portion of the first sentence of § 659.141(1) that prohibits out-of-state bank holding companies from acquiring *banks* located in Florida (D1-2). Congress has itself prohibited such acquisitions, absent affirmative legislative consent by a particular State. 12 U.S.C. § 1842(d).

at C1-4, in conjunction prohibit any bank holding company whose operations "are principally conducted outside" Florida from competing in the investment advisory and trust businesses in Florida.[4]

The district court held the statutes invalid under the Commerce Clause, as being in both purpose and effect purely "discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce" (B11). The court's conclusion as to purpose and effect is inescapable from the statutes themselves (see B12) and from the circumstances of the hurried amendment of § 659.141(1) (see B4-5, B15-16) and has been concurred in by both the Federal Reserve Board, 59 Fed. Res. Bull. 364, 366, and the Fifth Circuit, 559 F.2d 950, 954 & n.13, in earlier proceedings. The district court also rejected Florida's contention that Congress has consented to such otherwise unconstitutional discrimination (B17-21).

Florida and *amici curiae* Conference of State Bank Supervisors ("State Supervisors") and Florida Bankers

[4] Although the district court declared both statutes unconstitutional, it enjoined the enforcement only of the relevant portion of § 659.141(1), finding that an injunction would be premature as to § 660.10 (B22). As appellant ("Florida") acknowledges (Brief at 46), however, it was the *combination* of § 659.141(1)—which prohibited Bankers from owning a Florida trust company—and § 660.10—which prohibited all corporations other than Florida banks and trust companies from rendering trust services within Florida—that wholly precluded Bankers from providing trust services in Florida, and it was that statutory preclusion which was invalidated and is in issue here. Indeed, it is a stipulated fact that Bankers would comply with § 660.10 by forming a Florida trust company subsidiary were it not forbidden from doing so by the invalidated portion of § 659.141 (App. 23-24).

Thus, whether § 660.10 in isolation would be constitutional was not raised or decided below, and the second of Florida's Questions Presented (Brief at 4, discussed Brief at 45-53) goes beyond the confines of the controversy between the parties.

Association ("Florida Bankers") argue here both that Florida's discriminatory legislation is proper "regulation" under the Commerce Clause and that, in any event, Congress has consented to it. Their constitutional argument rests on a distorted reading of this Court's controlling decisions, and their attempt to create congressional consent depends on a tortured analysis that wholly ignores the structure and language of the Act and its legislative history. Both arguments are plainly wrong, as is the belated and remarkable suggestion, not joined in by Florida, that interstate commerce is not affected by Florida's statutory scheme. (See note 6, page 7, *infra*)[5]

Summary of Argument

This case presents only two issues: Whether Florida has transgressed the Commerce Clause by prohibiting out-of-state firms from competing with similarly situated local firms in the provision of trust and investment advisory services, which it patently has; and whether Congress has validated that transgression by its manifest consent, which it plainly has not.

The district court's judgment that Florida must legislate in conformity with the Constitution simply has nothing

[5] State Supervisors argue that the "rationale" of the decision below could jeopardize a "significant number" of state statutes cited in an appendix to their brief (Brief at 38; see Brief at 1 & n.1). The fact is that *none* of the other state statutes listed by State Supervisors is comparable to Florida's legislative scheme (see note 4, page 3, *supra*) because none precludes out-of-state holding companies from offering investment advisory services through local offices and subsidiaries or from establishing local trust company subsidiaries. The majority of the statutes cited simply prevent out-of-state holding companies from acquiring in-state *banks* and as such are clearly valid in light of 12 U.S.C. § 1842(d) (see note 3, page 2, *supra*). The others merely prohibit out-of-state corporations from serving in certain fiduciary capacities, without preventing their formation of local subsidiaries to act in such capacities.

to do with the continued existence of the dual system of banking (*i.e.*, the coexistence of federally chartered and state chartered banks) or the dual system of bank regulation (*i.e.*, the scrutiny, supervision and regulation of banks by both federal and state authorities). Indeed, the judgment, like the case, has nothing to do with banking at all. Nor does the decision below challenge in any way the ability of a State to require an out-of-state corporation to be locally licensed or to incorporate a local subsidiary as a condition of doing business, so long as such requirements are not used as devices to hinder commerce.

Florida's blatant protection of local business interests from out-of-state competition represents the paradigm of what the Commerce Clause forbids. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Hughes* v. *Oklahoma*, 441 U.S. —, 99 S. Ct. 1727 (1979). Florida's tortured, *ex post facto* efforts to create legitimate local interests and its rhetoric—echoed by *amici*—about giant financial combines are but expressions of disagreement with the decision of the Framers almost two centuries ago to create an economic as well as a political Union of the several States. Such disagreements raise no question for this Court. *Baldwin* v. *G.A.F. Seelig, Inc.*, *supra*.

Likewise, the alleged manifestations of Congress' consent are illusions lacking any substance.

Congress has unmistakably empowered the States, merely by legislative inaction, to preclude the entry of commercial bank subsidiaries of out-of-state bank holding companies. This case does not, however, in any way involve the business of commercial banking, as understood for decades and as defined unambiguously by Congress in the Bank Holding Company Act. *See United States* v. *Philadelphia National*

Bank, 374 U.S. 321 (1963). Rather, it involves other businesses—investment advisory and fiduciary services—that may be conducted by firms having banking powers as well as by firms and natural persons having no banking powers at all. These businesses are not transformed magically into "banking" simply because they may be, and often are, carried on by banks or corporate affiliates of banks, any more than the manufacture of aircraft becomes the manufacture of automobiles if carried on by a division or affiliate of General Motors.

Congress has not declared bank holding companies to be legal pariahs for Commerce Clause purposes, and they are as fully entitled to its protection as are other firms. Since Congress has nowhere said that the States may preclude out-of-state holding companies from providing investment advisory and fiduciary services from local offices, the judgment below must be affirmed.

ARGUMENT

I.

Florida's Protectionist Statutes Are Invalid Under the Commerce Clause.

In the "few simple words of the Commerce Clause" the Framers carried out their determination that commerce among the States be subjected to the power of the Nation in order to thwart "the tendencies toward economic Balkanization" that had plagued the country before Independence and under the Articles of Confederation. *Hughes* v. *Oklahoma*, 441 U. S. —, 99 S.Ct. 1727, 1731 (1979); *see Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935) (Cardozo, J.). To carry out that mandate, this Court has for nearly a century held that the Commerce

Clause operates as a restriction on permissible state regulation even in the absence of conflicting federal legislation. *See, e.g., Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U.S. 557 (1886); *Hughes* v. *Oklahoma, supra; see also Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.) (dictum).

Accordingly, the Court has consistently stricken down state legislation that restricts or bars interstate commerce while serving no local purpose other than the elimination of out-of-state competition. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).[6]

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[6] State Supervisors open their argument by contending, for the first time, that fiduciary and investment advisory services are "personal one-on-one services" provided "on a local basis" (Brief at 10) and "do not substantially affect interstate commerce" (Brief at 9 n.4). This contention appears to be echoed by Florida Bankers (Brief at 8-10).

Congress, however, has found and declared in § 201 of the Investment Advisers Act, 15 U.S.C. § 80b-1, that investment advisory services "are of national concern" and "substantially . . . affect interstate commerce," and no evident distinction exists between those services and fiduciary services. Such legislative findings are entitled to substantial weight. *Perez* v. *United States*, 402 U.S. 146, 152-56 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), particularly where as here they square so completely with the facts. The investment business, in which capital moves from where it is available to where it is needed, is the very epitome—indeed the *sine qua non*—of interstate commerce, and investment advisory and fiduciary services are inherent elements of the investment business.

Moreover, since it is indisputable that Bankers wishes to provide its services in interstate commerce, using the offices of a local subsidiary to "deliver" to customers the analysis and judgments formed and created by its New York-based organization, State Supervisors'

(footnote continued on following page)

Florida's "brazen attempt" [7] legislatively to shield its local business interests from the prospect of interstate competition overtly blocks entry into Florida by non-Florida bank holding companies seeking to render investment advisory and trust services, and is classic protectionism, as recognized below. On its face, the invalidated statutory scheme discriminates against interstate commerce as such and has no other discernible purpose or effect. Indeed, it entirely denies all bank holding companies principally located outside Florida (and therefore lacking representation in the Florida legislature) the ability to establish investment advisory offices or do trust business in Florida, preserving that market for Florida-based firms. The fact that some non-Florida companies and all individuals are theoretically left free to compete in Florida is beside the point: the out-of-state companies most likely to enter and compete in the Florida market are totally excluded by the statutory scheme, so that functionally identical Florida companies will not have to face their competition.

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argument seems to be that a State may avoid the strictures of the Commerce Clause by prohibiting the initiation of interstate commerce as to particular commodities or services and then pointing with pride to the fact that all such trade is conducted in that State purely "on a local basis." Thus, the very existence of "economic Balkanization" as to any commodity or service becomes constitutional justification for its perpetual preservation by protectionist State legislation. This proposition mocks the Constitution and the Court.

United States v. *Oregon State Medical Society,* 343 U.S. 326 (1952), cited by State Supervisors (Brief at 9), simply holds that it was not clear error for the district court to conclude that the Government had failed to prove that interstate commerce was affected by certain activities challenged under the antitrust laws. *Compare, Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975) (legal services performed wholly intrastate substantially affect interstate commerce).

[7] *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954, n.13 (5th Cir. 1977) (reversing district court's decision to abstain and remanding for consideration on the merits).

This case thus involves an actual prohibition of interstate commerce, not merely a burden (incidental or otherwise) on commerce, and presents at least as appropriate an occasion as *Philadelphia* v. *New Jersey* for application of a *per se* rule of invalidity.[8] Nothing in *Hughes* v. *Oklahoma,* handed down after the decision below, or in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), suggests otherwise; indeed, application of the *Pike-Hughes* three-point test, *see* 99 S.Ct. at 1736, confirms the patent (*i.e., per se*) invalidity of Florida's protectionist scheme:

First, the challenged statutory scheme does not regulate "evenhandedly" with only "incidental" effects on interstate commerce. Indeed, it does not "regulate" at all except by directly discriminating against interstate commerce on its face and in effect. In *Hughes,* this Court emphasized that such facial discrimination may be a fatal defect (*i.e.,* require *per se* treatment), and that

> "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 99 S.Ct. at 1737.

Such scrutiny here only confirms the patently protectionist nature of the statutory scheme.

Second, the statute serves no "legitimate local purpose"; its only purpose is the protection of local business interests

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[8] Two members of the Court considered the provision held invalid in *Philadelphia* v. *New Jersey* to be a public health measure, not a regulation of "commerce" in the normal sense and certainly not designed to protect the economic interests of New Jersey's commercial community. They would have held that it did not unlawfully burden commerce—although it wholly precluded the commerce involved—in merely allowing locally generated waste, which had to be disposed of somehow, to continue to be used as landfill within the state. 437 U.S. at 629-33 (Rehnquist, J., dissenting). No such analysis is possible here; Florida's sole purpose and effect is the prohibition of interstate commerce.

—at whose behest it was enacted (see B5)—against competition from interstate firms. Having belatedly recognized the constitutional necessity of "legitimate" local purposes, Florida in its argument to the district court conjured up a local interest: it argued below that its statutory scheme, which limits the number of competitors in Florida, was intended to enhance competition there. This novel—indeed almost Orwellian—economic contention has here been abandoned by Florida,[9] which advances no other in its place, confirming further the district court's finding that Florida's only purpose was discrimination.[10] *Amici* here revive Florida's discarded rationalization and add two others, which are equally unpersuasive [11] and as to which *amici* cite not a snippet of legislative history.

[9] Even had that been Florida's purpose, the statutes are not "even-handed," since their distinctions turn on location. *Compare, Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Moreover, their effect on interstate commerce is not "incidental" and the availability of non-discriminatory alternatives is obvious (*e.g.,* regulatory supervision of all competitors and vigorous enforcement by the State of state and federal antitrust laws). Finally, discrimination against interstate commerce having been established, the burden was on Florida to show both concrete local benefits and "the unavailability of nondiscriminatory alternatives adequate to preserve" those benefits, *Hughes, supra,* 99 S.Ct. at 1736, which it totally failed to do (see note 11, *infra*).

[10] The district court also found that Florida lacked any factual basis for its contention that the statutes were necessary and appropriate to the alleged goal of preserving competition (B14-15); far from being clearly erroneous, these two findings are irrefutable, as Florida apparently concedes.

[11] State Supervisors urge that Florida's statutory scheme is necessary to serve the following, newfound local interests, neither of which was even suggested to the district court:

> (1) *To "protect the public against unsound business practices" by excluding out-of-state bank holding companies which are "too large and too far-flung to be regulated properly"* (State

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Third, the availability of less discriminatory alternative means to serve the "legitimate" local purpose is ignored by Florida and Florida Bankers, who apparently concede the

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> Supervisors at 22; Florida Bankers at 12-13). In addition to falsely equating "out-of-state" with "large and far-flung," and "large" with necessarily less rigorously regulated, this assertion ignores the regulatory control that Florida would possess over a discrete nonbank subsidiary qualified in Florida. State Supervisors' citations to *Iowa Independent Bankers* v. *Board of Governors* and G. Fisher, *Bank Holding Companies* (1961) (Brief at 22) are of no avail: the former concerns *bank* subsidiaries, not local nonbank subsidiaries, and the latter merely discusses the problems that existed in the early twentieth century before the federal legislation which "rectified" the situation. *Id.* at 9.
>
> (2) *To "further local control" over "banks and related financial services" because of the "positive impact such local control has on the level of civic involvement and related lifestyle values"* (State Supervisors at 22). This asserted local interest, extracted almost verbatim from *Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256, 1283 (5th Cir. 1978), *reversed on other grounds sub nom. Leroy* v. *Great Western United Corp.,* — U.S. —, 99 S.Ct. 2710 (1979), is not a *legitimate* local interest under the Commerce Clause, *Baldwin* v. *G.A.F. Seelig, Inc., supra,* and is present in every protectionist scheme.
>
> This "interest" is not in any event served by Florida's statutory scheme, which excludes only out-of-state banking and trust companies; other foreign corporations are free to enter Florida, as State Supervisors themselves point out (Brief at 17-18). In addition, a Florida bank holding company escapes the ban of the statutes even if wholly owned by a Caracas, Venezuela shareholder. Furthermore, the statutory scheme would permit a major Miami bank holding company to establish a trust company or investment advisory subsidiary hundreds of miles away in the Florida panhandle, but would deny that ability to a much more "local" holding company located only a few miles away in Georgia or Alabama. Finally, to the extent Florida's statutes require bank holding companies to conduct their investment advisory business in Florida by telephone or through the mails, as suggested by Florida Bankers (Brief at 8-9), instead of through local subsidiaries, local control over such financial services is hindered, if not thwarted entirely.

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issue. State Supervisors assert that "given the nature of the interests protected," no less discriminatory alternatives exist (Brief at 28). This is obviously incorrect: Florida could, without discrimination, address all the concerns that State Supervisors now say its legislature had in mind simply by enacting a statute similar to § 4 of the Bank Holding Company Act, 12 U.S.C. § 1843. *See e.g.*, Tex. Bank Code Ann. art. 342-913 (Vernon) (Supp. 1978-1979).

Application of the "balancing test" urged by State Supervisors (Brief at 20) thus leads simply to the conclusion that the statutes are in fact *per se* invalid.

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978), upon which Florida and *amici* place heav reliance, does not lend even superficial support to their assertion that states may distinguish between functionally identical companies solely on the basis of where their operations are principally located. As the Court emphasized, the statute in *Exxon* did not "distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126. Maryland, to serve a legitimate local purpose, *id.* at 121, 125, legislated against *all* vertically integrated firms, whether Maryland-based or out-of-state. The fact that all integrated

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Amici's related argument that "regulation" of fiduciary and investment advisory activities is left to the States is both wrong and irrelevant. It is wrong because the largest and most significant segment of fiduciary business today—employee benefit trusts—is now closely governed by the federally enacted standards contained in the Employees Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. It is also wrong because, as *amici* recognize (State Supervisors at 27), state regulation of investment advisers is superseded if it conflicts with the Investment Advisers Act of 1940.

This argument is irrelevant because the decision below does not impose federal control over fiduciary and investment advisory activities, but instead simply invalidates a state's attempt not to "regulate," but to exclude.

firms were out-of-state firms was truly "incidental" to the legitimate regulatory purpose of the legislation, and non-integrated interstate firms were treated exactly as were Maryland-based non-integrated firms, with the latter afforded "no competitive advantage" over the former. *Id.* at 125-26.

Florida has not sought to exclude Florida firms otherwise similarly situated to Bankers (*i.e.*, Florida-based bank holding companies) from the trust and investment advisory businesses. Florida has acted not against economically *integrated* business but against *interstate* businesses.[13] Discrimination against interstate commerce to confer a competitive advantage on Florida's own business community is the sole purpose and effect of the statutes. *Cf. id.* at 126.[14] They are, as held below, invalid.

[13] Where the Maryland statute at issue in *Exxon* distinguished between firms based solely on their structure, Florida's statutes discriminate on the basis of the firm's location. This distinction is crucial; while a total, nondiscriminatory ban of all bank holding companies could arguably serve a legitimate local interest, as did the statute in *Exxon*, the exclusion solely of out-of-state firms can only serve the illicit purpose of discrimination.

[14] Florida and *amici* repeatedly assert that an otherwise unconstitutional statutory prohibition on interstate commerce can be rescued from invalidity if there are some exceptions to the prohibition, no matter how small or insignificant. Thus, they cite the potential for entry by out-of-state individuals and some out-of-state corporations, but ignore the sole purpose and function of the statutes—to confer a competitive advantage on Florida's own business community by treating functionally identical in-state and out-of-state firms completely differently.

The Commerce Clause is not satisfied so long as some out-of-state entry is possible, particularly when those for which such "entry" is theoretically possible are the least likely to enter; it requires more—an absence of discrimination against interstate commerce, as such, to advantage local economic interests. To read the Commerce Clause as invalidating only those statutes which contain no exception whatsoever, as Florida and *amici* would do, is to read the Commerce Clause out of the Constitution.

We note, finally, that neither the district court nor Bankers disagreed with the propositions that states may exercise their police power to regulate fiduciaries, banks and investment advisers (State Supervisors at 20-21, 24) or that states may require out-of-state corporations to obtain a certificate of authority before doing business within a state (Florida Bankers at 9-10, 14-15). But in the absence of congressional sanction (which does not here exist, see Point II, *infra*), these traditional powers to *regulate* do not embrace the power to *exclude* discriminatorily, and none of the cases cited by State Supervisors or Florida Bankers holds, or even suggests otherwise.[15]

II.

Congress Has Not Authorized the States To Discriminate Against the Nonbank Subsidiaries of Out-of-State Bank Holding Companies.

Florida and State Supervisors would have the Court find congressional consent to Florida's patent discrimination against interstate commerce in § 3(d) and § 7 of the Act, 12 U.S.C. §§ 1842(d), 1846. Section 3(d), which pertains to the formation or acquisition of *banks* by bank holding companies, simply has nothing to do with this case because this case has nothing to do with the formation or acquisition of a bank. Section 7, which merely allows the exercise of otherwise legitimate state authority—to the extent not inconsistent with the Act—likewise has no bearing here since the States have no authority under the Constitution

[15] Florida and State Supervisors misconstrue the import of § 222 of the Investment Advisers Act, 15 U.S.C. § 80b-18a (Florida at 59; State Supervisors at 26-27). At issue here is not the ability of a state securities commissioner to regulate investment advisers, but the power of the state legislature to prevent all out-of-state bank holding companies from establishing investment advisory businesses in Florida. It is not conflict with the Advisers Act that is before the Court (State Supervisors at 27), but conflict with the Constitution.

to discriminate against interstate commerce for the benefit of local business interests.

STRUCTURE OF THE BANK HOLDING COMPANY ACT. In the Act, Congress has classified the subsidiaries of bank holding companies into two categories: (1) "banks" and (2) all others, *i.e.*, those doing such nonbanking businesses as may be authorized by the Federal Reserve Board, pursuant to the limitations and standards of the Act. Section 3 of the Act regulates the formation and acquisition of "bank" subsidiaries, and includes in § 3(d) a restriction of "bank" acquisitions across state lines. Section 4 limits and regulates the other, nonbanking, subsidiaries that may be organized or acquired by holding companies, and contains no interstate restrictions. The nonbanking activities sanctioned by § 4 include investment advisory and trust services, as the Federal Reserve Board has by regulation declared. 12 C.F.R. § 225.4(a)(4), (5). Florida and State Supervisors here call upon the Court to rewrite the Act and to eliminate the sharp distinction Congress has drawn.

SECTION 3(D). This subsection of § 3 prohibits holding companies from crossing State lines in their ownership of "bank" subsidiaries, unless the State of the bank to be acquired or organized has by statute waived the prohibition. Florida and State Supervisors urge that this narrow state role—to *waive* the restriction of § 3(d)—also includes the power to *extend* it to § 4 activities, so that out-of-state bank holding companies may constitutionally be barred from acquiring or organizing nonbank subsidiaries within the State. This contention is nonsense:

First, the prohibition of § 3(d) applies by its plain language only to holding companies' acquisitions of "banks," a term Congress carefully defines in § 2(c) of the Act as

> "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on de-

> mand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

Neither Florida nor *amici* contend that Bankers seeks to own and operate in Florida a business that would be a "bank" within the meaning of § 2(c); they argue instead that the term is or should be construed more broadly than Congress, in specific terms, has defined it. This, Florida says, is necessary to close a "loophole." (Brief at 26)[16]

The attempt to substitute in § 3(d) a different, and unusual, meaning for the word "bank" than that which is prescribed by the preceding section of the Act contravenes established principles of statutory construction, not to mention common sense. Florida and *amici's* extensive argument of purported congressional policy and legislative history disregards the importance this Court has consistently accorded a statute's plain meaning. Where the provisions of a statute are "clear and unequivocal on their face," the Court finds "no need to resort to the legislative history of the Act." *United States* v. *Oregon,* 366 U.S. 643, 648 (1961) (footnote omitted).[17]

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[16] State Supervisors also attempt to manipulate legislative history to justify an interpretation of § 3(d) that contrasts sharply with its plain meaning (Brief at 29-31). In fact, the legislative history reinforces the plain meaning by demonstrating that § 3(d) was enacted to eliminate a concern that the general McFadden Act restriction on *bank* branching across state lines would be subverted by holding company incorporation of separate *bank* subsidiaries in various states. 102 CONG. REC. 6860 (remarks of Sen. Douglas) (1956); *see* H.R. REP. No. 609, 84th Cong., 1st Sess. 24 (1955) (discussing § 5(c) of H.R. 6227).

[17] *Cf. United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (1940):

> "When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." (footnote omitted)

Here, no such "absurd or futile" or even arguably unreasonable results stem from the statute's plain meaning.

In a futile effort to avoid the plain meaning of the defined term "bank", State Supervisors fashion a unique approach to statutory construction: superseded definitions of "bank" in the Act should be consulted when construing § 3(d) and the present definition should be ignored (Brief at 29-30). Their illogical argument disregards determinative legislative history. "Bank" was originally defined in the Bank Holding Company Act of 1956 to include "trust companies" because in several states some commercial banks were called "trust companies." Staff of Senate Comm. on Banking and Currency, 89th Cong., 1st Sess., Amendments to the Bank Holding Company Act of 1956 6-7 (Comm. Print 1965). As Congress recognized, this definition was inadvertently overbroad in embracing nondeposit trust companies and, accordingly, one of the 1966 amendments to the Act modified the definition of "bank" to exclude such companies.[18] Thus, even if the restriction of § 3(d) unintentionally applied to all trust companies in 1956, Congress deliberately acted in 1966 to cure the error.[19]

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[18] "The purpose of the act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. . . . To avoid this result, the bill redefines 'bank' . . . as to exclude institutions like . . . nondeposit trust companies." S. REP. No. 1179, 89th Cong., 2d Sess. 7 (1966).

[19] Florida Bankers is fully aware of this deliberate decision and is now trying to persuade Congress to reverse it. Upon the urging, *inter alia,* of Florida Bankers, 125 CONG. REC. S15525 (daily ed. Oct. 31, 1979), the Senate included an amendment to § 3(d) in the proposed Depository Institutions Deregulation Act of 1979, H.R. 4986, which was passed by the Senate on November 1, 1979. 125 CONG. REC. S15691 (daily ed.). The Senate revision of H.R. 4986 would apply the restrictions of § 3(d) "to the acquisition of shares or assets of, or interests in, a trust company." H.R. 4986, 96th Cong., 1st Sess. § 312 (1979). Obviously, if § 3(d) already applied to trust companies, such an amendment would be superfluous.

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Confronted with a statute whose plain meaning clashes with their contention and whose legislative history squarely confirms the plain meaning, Florida and *amici* can only argue, once again incorrectly, by analogy from the McFadden Act, 12 U.S.C. § 36. State Supervisors, in particular, argue that § 3(d) must be construed broadly to insure "competitive equality between state and national banks" (Brief at 30), which they say is a congressional policy expressed in that Act. This illogical proposition, even if valid, has no application here: Bankers is a *state,* not a national bank. In addition, Florida's statutory scheme excludes both national and state banks and cannot be justified by a purported policy of congressional competitive equality between state and national banks.[20]

(footnote continued from preceding page)

Enactment of the Senate version of H.R. 4986 would moot this action insofar as it concerns trust services.

[20] State Supervisors thus mischaracterize *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966), in suggesting that the Court there found a congressional policy of generalized "competitive equality between state and national banks" in all markets (Brief at 30). They omit reference to critical language in the Court's opinion:

> "It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added).

As discussed, the present case has literally nothing to do with "competitive equality between state and national banks" in any respect.

State Supervisors' reliance on *St. Louis County National Bank* v. *Mercantile Trust Company National Ass'n.,* 548 F.2d 716 (8th Cir. 1976), is also misplaced. There, the court construed the McFadden Act's definition of "branch":

> "The term branch as used in this section shall be held to *include* any branch bank, branch office, branch agency, addi-

(footnote continued on following page)

Florida's "loophole" argument is but its way of saying that it disagrees with the policy decision made by Congress to treat differently the banking and nonbanking activities of bank holding companies. The "loophole" is the law.[21]

Second, the attempt to expand the prohibition of § 3(d) to encompass nonbank subsidiaries disregards the language of § 3(d): "no application shall be approved under *this section*"—*i.e.,* § 3, which as noted above governs only the formation or acquisition of *banks.* Section 4 regulates holding companies' entry into nonbanking ventures such as in-

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> tional office, or any branch place of business located in any State . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (emphasis added).

The Eighth Circuit, stressing the word "include," 548 F.2d at 718-19, simply rejected an assertion that any office of a bank at which no "deposits are received, or checks paid, or money lent" is necessarily not a branch. By contrast to the arguably open-ended definition construed in *St. Louis County National,* the definition of "bank" in the Bank Holding Company Act is precise and limiting, *see* 12 U.S.C. § 1841(c), *supra,* and the "broad approach" to statutory construction urged by State Supervisors (Brief at 31), while perhaps appropriate in *St. Louis County National,* has no place here.

[21] Florida's and *amici's* reliance on *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,813 (D.C. Cir., March 30, 1979), *modified,* No. 77-1862 (D.C. Cir., July 13, 1979) (whether bank holding companies and their subsidiaries can have certain relationships with investment companies) is unavailing and, in fact, misleading. That case, like others cited by Florida (Brief at 33), simply decided whether certain *types* of nonbanking activities were so closely related to banking as to be permissible for bank holding companies under § 4, not whether a State may preclude out-of-state holding companies from engaging in activities that in-state holding companies may conduct under both § 4 and applicable state law. The activities involved in *ICI,* moreover, are not the activities here, as that case dealt with the relationship of bank affiliates to regulated investment companies.

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vestment advice and trust administration, and that section contains no restriction comparable to § 3(d).[22]

Third, were § 3(d) not limited to holding companies' acquisitions of "banks" (as defined), its flat prohibition would already operate to prohibit Bankers' proposed Florida operations. If, as Florida and State Supervisors suggest, Congress intended § 3(d) to have that effect, there would be no need for Florida's own legislative prohibitions. The authors of the hasty amendment to § 659.141(1), Florida's legislators and bankers, unmistakably understood what Florida's advocates do not.[23]

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The "straw man" issue stressed by Florida—whether the 1970 amendments to the Act liberalized the *types* of activities in which bank holding companies can engage—is wholly irrelevant to this case. The only issue here is the constitutionality of state-imposed geographical barriers to admittedly permissible activities—activities permitted by Florida to its own companies.

In any event, the court of appeals in *ICI,* in a modification of its opinion, expressly rejected the broad reading of that opinion pressed by Florida's advocates:

> "Under these circumstances, we do not reach, and are not to be taken as expressing any view on, the question of whether bank holding companies and their non-bank subsidiaries may, either under the present regulation or one more narrowly drawn, *render solely investment advice* to closed-end investment companies, as distinct from sponsoring, organizing, managing, or controlling such companies." *Id.,* n.13, *added by order,* No. 77-1862 (D.C. Cir., July 13, 1979) (emphasis added).

[22] The question of whether § 3 or § 4 governs an application is not, even apart from § 3(d), merely an administrative technicality, since the two sections specify different criteria by which applications are to be judged.

[23] Florida and *amici* actually argue that § 3(d) prohibits *all* holding company acquisitions of nonbanking businesses except in the one state in which the holding company's banking business is principally conducted. This construction of § 3(d) would invalidate literally hundreds of acquisitions approved by the Federal Reserve Board since 1956, the incredible result of an incredible suggestion.

SECTION 7. In their faltering effort to demonstrate that Congress intended to sanction Florida's discrimination against interstate commerce, Florida and *amici* grasp as well at § 7 of the Act, 12 U.S.C. § 1846. Florida argues in the face of clearly contrary statutory language and legislative history that § 7 "operates to assure that the states are free to regulate bank holding companies and their subsidiaries without fear of Commerce Clause attack" (Brief at 64).

Again, Florida and *amici* are plainly wrong. As the legislative history makes abundantly clear, § 7 was not intended to grant new authority to the States, but only "to *preserve* to the States those powers which they now have in our dual banking system." S. REP. No. 1095 (Part 2), 84th Cong., 2d Sess. 5 (1956) (emphasis added).[24] The plain language of the section unambiguously carries out that purpose:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Thus, the only state legislation permitted by § 7 is that which would have been permitted absent enactment of the Act, *i.e.,* that which passes muster under the Commerce Clause *without* aid of congressional authorization, which

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[24] The Senate Report further states with respect to § 7:

> "The intent of the committee was to make it clear that a State could not enact legislation inconsistent with the bill and therefore nullify its effect. . . . [Y]our committee reiterates its view that section 7 in no way permits States to exercise such powers and jurisdiction in a manner inconsistent with this proposed legislation." *Id.*

the Florida statutory scheme does not. A section of the Act that merely preserves the otherwise lawful "powers and jurisdiction" of the States over "banks, bank holding companies, and subsidiaries" cannot by mere assertion be transformed into a section that adds substantial new powers of otherwise unconstitutional breadth.

Amici State Supervisors and Florida Bankers argue that before passage of the Act, the States possessed the power to enact the statutes at issue here. For example, State Supervisors say that since the States are free to ban bank holding companies altogether, the "lesser restrictions" of Florida's statutory scheme must be permissible (Brief at 34). This argument simply ignores the nondiscriminatory nature of a total prohibition and begs the central question: whether the "lesser restrictions" which blatantly favor Florida over non-Florida holding companies are constitutional.

* * *

"This case presents the narrow question of what Congress did, not what it could do." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941). What Congress did here is quite clear; it limited to "banks" the States' power to exclude subsidiaries of out-of-state bank holding companies. It did not authorize unconstitutional discrimination against interstate commerce in trust and investment advisory services such as Florida seeks to enforce.

Conclusion

The decision below fully accords with this Court's controlling decisions under the Commerce Clause. The construction of the Bank Holding Company Act proposed by Florida and *amici* is patently wrong. The judgment below should be affirmed.

Respectfully submitted,

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December 19, 1979